

11 PERFORMANCE GUARANTEES AND REMEDIES

(a) Performance Bond.

(1) Grantee shall obtain and maintain during the entire term of the Franchise, and any renewal or extensions thereof, except as provided in Section 11(a)(4) below, a non-cancelable performance bond in the County's favor in the amount of \$500,000, to ensure the Grantee's faithful performance of its obligations.

(2) The performance bond shall provide the following conditions:

(A) There shall be recoverable by the County from the principal and surety, any and all fines and penalties due to the County and any and all damages, losses, costs, and expenses suffered or incurred by the County resulting from the failure of the Grantee to faithfully comply with the material provisions of this Agreement, the Cable Ordinance, and other applicable law, to comply with all orders, permits and directives of any County agency or body having jurisdiction over its acts or defaults, to pay fees, penalties or liquidated damages due to the County, or to pay any claims, taxes or liens due the County. Such losses, costs and expenses shall include but not be limited to reasonable attorney's fees and other associated expenses.

(B) The total amount of the performance bond required by this Agreement shall be forfeited in favor of the County in the event:

- (i) the Grantee abandons Grantee's Cable System at any time during the term of its Franchise or any extension thereto; or

- (ii) the Grantee carries out a Transfer without the express written consent of the County as provided in Section 3 of this Agreement.

(3) The performance bond shall be issued by a surety with an A-1 or better rating of insurance in Best's Key Rating Guide, Property/Casualty Edition; shall be in a form satisfactory to the County Attorney; shall be subject to the approval of the County; and shall contain the following endorsement:

This bond may not be canceled or allowed to lapse, until at least thirty days after receipt by the County, by certified mail, return receipt requested, of a written notice from the issuer of the bond of intent to cancel or not to renew.

(4) Reduction of Bond. The County may approve a reduction in the amount of the bond upon written application by the Grantee, which approval shall not be unreasonably withheld. The amount of the bond may be reduced to \$250,000.00 when the HSN System Upgrade has been extended to more than fifty percent of the occupied dwelling units within the area where service is available on the Effective Date of this Agreement, as certified by the Grantee to the County, and may be further reduced to the sum of \$50,000.00 when the HSN System Upgrade has been extended to more than ninety percent of the occupied dwelling units within that area, as certified by the Grantee to the County. Reductions granted or denied upon application by the Grantee shall be without prejudice to the Grantee's subsequent applications or to the County's right to require the full bond at any time thereafter.

(5) Right to Require Additional or Other Bonds. The County shall have the right, at any time that it reasonably deems itself insecure, to require that any bond be replaced by

such other bond as the County may reasonably require, notwithstanding the fact that the County may have indicated its acceptance or approval of any bond(s) submitted with this Agreement.

(b) *Security Deposit.*

(1) In addition to the performance bond, the Grantee shall deposit with a third party agent ("Third Party Agent") a security deposit in the amount of \$50,000 (the "Security Deposit"), pursuant to a Security Deposit Agreement attached hereto as Appendix 5. This Security Deposit Agreement shall include *inter alia* the following terms and conditions:

(A) If the County notifies the Grantee of any amounts due to the County pursuant to this Agreement or applicable law, and the Grantee does not make such payment within ten business days, the County may withdraw the amount in question, with any applicable interest and penalties, from the Security Deposit by notice to the Grantee and the Third Party Agent specifying the amount and purpose of such withdrawal, and the Third Party Agent shall pay such amount to the County; provided, however, that if the Grantee files a legal action disputing the County's claim, the ten-business-day notice period shall be tolled as to that claim until the claim is resolved by order of the trial court.

(B) If at the time of a withdrawal from the Security Deposit by the County, the amount available with the Third Party Agent is insufficient to provide the total payment of the claim asserted in the County's notice of withdrawal, the balance of such claim shall not be discharged or waived, but the County may continue to assert the same as an obligation of the Grantee to the County.

(C) No later than thirty days after mailing of notification to the Grantee by certified mail, return receipt requested, of a withdrawal under the Security Deposit, the Grantee shall restore the amount of the Security Deposit to \$50,000.

(D) Upon termination of the Franchise, any balance then remaining in the Security Deposit shall be returned to the Grantee by the Third Party Agent within ninety days of such termination, provided that there is then no outstanding default on the part of the Grantee.

(E) Any interest accruing to the Security Deposit while it is being held by the Third Party Agent shall be for the benefit of the Grantee, and shall be paid by the Third Party Agent to the Grantee on a regular basis, and any amount in excess of \$50,000 may be withdrawn by the Grantee.

(c) *Rights Cumulative.* The rights reserved to the County in this Section 11 are in addition to all other rights of the County, whether reserved herein or authorized by applicable law, and no action, proceeding or exercise of a right with respect to a performance bond or the Security Deposit shall affect any other right the County may have. Neither the making of the Security Deposit, nor the receipt of any damages recovered by the County thereunder, shall be construed to excuse the faithful performance by the Grantee or limit the liability of the Grantee under the terms of its Franchise for damages, either to the full amount of the Security Deposit or otherwise; provided, however, that the amount of any damages recovered by the County through the Security Deposit shall be offset against any damages otherwise recoverable by the County.

(d) *Remedies.* In addition to any other remedies available at law or equity, the County may revoke the Franchise for a material violation as set forth in Section 12(1)(2) of this Agreement pursuant to the procedures specified in this Agreement.

(e) *Liquidated Damages.* Because the Grantee's failure to comply with provisions of the Franchise and this Franchise Agreement will result in injury to the County, and because it will be difficult to estimate the extent of such injury, the County and the Grantee agree to the following liquidated damages to be effective during the term of the Franchise for the following violations of the Franchise and of this Agreement, which represent both parties' best estimate of the damages resulting from the specified violation. Such damages shall not be a substitute for actual performance by the Grantee of a financial payment, but shall be in addition to any such actual performance. The Communications Administrator, or designee, shall have the authority to waive or reduce the liquidated damage amounts herein for good cause. Cure periods listed below shall begin to run at the time the Grantee is notified in writing of a violation by the County, unless otherwise specified below.

(1) For failure to comply with the design submission process specified in Section 6(e): \$400/day for each violation for each day the violation continues after a seven-day cure period;

(2) For failure by the Grantee to substantially comply with the upgrade schedule specified in Section 6(f): \$2,000/day for each violation for each day the violation continues after a thirty-day cure period, if the Grantee has not undertaken substantial corrective action to cure the violation within that thirty-day period;

(3) For a Transfer without approval as specified in Section 3: \$2,000/day for each violation for each day the violation continues;

(4) For failure to substantially comply with requirements for public, educational and governmental use of the System pursuant to Sections 7(a)(1), (2), or (6), 7(b),

7(d), 7(e)(2), 7(f), 7(g), or 7(h): \$1,000/day for each violation for each day the violation continues after a fourteen-day cure period, if the Grantee has not undertaken substantial corrective action to cure the violation within that fourteen-day period;

(5) For failure to provide to the County information, reports, or filings lawfully required under the Franchise Agreement or applicable law or by the County: \$200/day for each violation for each day the violation continues after a thirty-day cure period, which shall begin to run on the due date of any regularly scheduled report and on the date of a deadline reasonably set by the County for any report or information request not regularly scheduled, unless the Grantee shows that it was not in fact aware of the requirement in question, in which case the thirty-day cure period shall begin to run upon written notice of such requirement by the County to the Grantee;

(6) Customer Service Standards:

(A) For each day during which the County determines that the Grantee has violated each of the following types of customer service standards according to the terms in which such standards are established in governing law or regulations: \$200 per violation:

- (i) failure to maintain office hours;
- (ii) failure to keep an appointment with a subscriber, or to offer a subscriber the prescribed compensation for a missed or late appointment, provided that in this case the liquidated damages shall be offset by the amount directly refunded to the subscriber by the Grantee for such appointment;
- (iii) failure to extend service to a subscriber;

- (iv) failure to arrange for converter transportation for a mobility-limited subscriber;
- (v) failure to acknowledge a service request in timely fashion;
- (vi) failure to complete repairs or maintenance;
- (vii) failure to provide required information to a subscriber or to the County;
- (viii) failure to disclose price terms to a subscriber;
- (ix) failure to maintain the public file;
- (x) improper charge of a late fee to a subscriber;
- (xi) failure to respond to a subscriber complaint in timely fashion.

(B) A separate violation under subsection (A) shall be deemed to occur whenever the County reasonably determines that one of the above separately enumerated transgressions has occurred on one day. Thus, for example, if the Grantee fails to extend service to one subscriber for two days pursuant to governing law or regulation, there would be two violations; if the Grantee fails to keep an appointment pursuant to governing law or regulation with one subscriber on one day and on that same day, independent of the missed appointment, the Grantee fails to disclose price terms to that same subscriber, then there would be two violations. However, the Grantee shall not be charged with multiple violations for a single act or event affecting a single subscriber or for a single act or event affecting multiple subscribers on the same day.

(C) Each violation under subsection 11(e)(6)(A), except for violations under subsections 11(e)(6)(A)(i) and 11(e)(6)(A)(ix), shall be subject to a ten-day cure period which shall begin to run upon notice by the County to the Grantee of such a violation. Grantee shall be deemed to cure such a violation if it provides appropriate compensation, as agreed to by the County and the Grantee, to all affected Subscribers as to which the County has given such notice.

(D) For failure to meet customer service standards with regard to telephone answering time, time to transfer a call to a customer service representative, or excessive busy signals: if such standards are not met according to the terms in which such standards are established in governing law or regulations in any quarter, \$200 for each day during that quarter on which such standards were not met;

(7) For failure to pay any Franchise fees pursuant to Section 8 or Total Grants pursuant to Section 7(c): \$100 per day after a seven-day cure period;

(8) For failure to file, obtain or maintain the required performance bond pursuant to Section 11(a) in a timely fashion: \$200 per day;

(9) For failure to bring into compliance any violation of construction standards within the appropriate time periods as specified in Section 5(c)(6) of this Agreement: \$200 per violation; and

(10) For violation of technical standards established by the FCC or other lawful authority: \$100 per day for each day the violation continues after a thirty-day cure period after the County gives the Grantee notice of such violation.

(f) Shortening, Revocation, or Termination of Franchise

(1) Upon completion of the term of any Franchise granted under this Agreement, if a new, extended, or renewed Franchise is not granted to the Grantee by the County, the Grantee's right to occupy the Public Rights-of-Way and public land shall terminate, subject to applicable federal law.

(2) The County shall have the right to revoke the Franchise, or to shorten the term of the Franchise to a term not less than thirty-six months from the date Grantee receives written notice from the County of the County's decision to act pursuant to Section 11(f)(3) herein concerning the County's shortening action, for the Grantee's material violation of this Agreement pursuant to Section 12(l)(2).

(3) To invoke the remedies of Section 11(f)(2), the County shall give the Grantee written notice of the default in its performance. If within sixty calendar days following such written notice from the County to the Grantee, or such other period as this Franchise Agreement shall require or the Grantee and the County shall agree, the Grantee has not taken corrective action to the reasonable satisfaction of the County, the County may give written notice to the Grantee of its intent to revoke or shorten the term of the Franchise, stating its reasons; provided that no opportunity to cure shall be provided where the Grantee is shown to have defrauded or attempted to defraud the County or its Subscribers in connection with this Agreement or Cable Service in any way that has a material adverse effect on Grantee's provision of Cable Services pursuant to this Agreement.

(4) Prior to shortening the term of or revoking the Franchise, the County shall hold a public hearing, after providing thirty days' written notice to the Grantee, specifying its reasons for shortening or revoking the Franchise, at which time the Grantee and the public shall

be given an opportunity to be heard. Following the public hearing, the County may determine whether to shorten the Franchise term or to revoke the Franchise based on the information presented at the hearing, and other information of record, or, where applicable, grant additional time to the Grantee to effect any cure. If the County determines to shorten the term of or revoke the Franchise, it shall adopt an ordinance that shortens the term of or revokes the Franchise and sets forth the reasons for its decision. A copy of such ordinance shall be transmitted to the Grantee.

(5) If the County revokes the Franchise, or if for any other reason the Grantee terminates the Franchise, the following procedures and rights are effective:

(A) The County may require the former Grantee to remove its facilities and equipment located in the Public Rights-of-Way or on public land at the former Grantee's expense and to restore such affected sites as required in Section 5(b)(9) or permit the former Grantee to abandon such facilities in place, subject to the provisions of Section 5(b)(14). If the former Grantee fails to remove its facilities within a reasonable period of time after the County orders it to do so, and such removal is necessary to make room for other facilities or to remove potential safety hazards as required by sound engineering practices, then the County may have the removal performed at the former Grantee's and/or surety's expense.

(B) The County may require the former Grantee to continue operating Grantee's Cable System as specified in Section 4(c).

(C) In the event of revocation, the County, in accordance with state law, may acquire ownership of or effect a transfer of Grantee's Cable System at an Equitable Price.

(g) *Condemnation.* This Franchise Agreement shall not limit any authority of the County in accordance with state law to condemn, in whole or in part, the Franchise and/or any other property of the Grantee, provided that the Grantee shall receive whatever condemnation award the Grantee would normally be entitled to recover as a matter of state law. Partial condemnation of the Grantee's Franchise or property shall not terminate this Agreement except in accordance with the terms of this Agreement.